

# **PRE- ACTION PROTOCOL FOR POSSESSION PROCEEDINGS BASED ON MORTGAGE ARREARS IN RESPECT OF RESIDENTIAL PROPERTY**

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### **SECTION 1- INTRODUCTION**

- 1.1 This protocol describes the behaviour the court will normally expect of the parties prior to the start of a possession claim within the scope of paragraph 3.1 below.
- 1.2 This protocol does not alter the parties' rights and obligations.
- 1.3 It is in the interests of the parties that mortgage payments are made promptly and that difficulties are resolved wherever possible without court proceedings. However in some cases an order for possession may be in the interest of both the lender and the borrower.

## **2. AIMS**

- 2.1 The aims of this protocol are to-
  - (1) ensure that a lender or home purchase plan provider (in this protocol collectively referred to as 'the lender') and a borrower or home purchase plan customer (in this Protocol collectively referred to as 'the borrower') act fairly and reasonably with each other in resolving any matter concerning mortgage or home purchase plan arrears; and
  - (2) encourage more pre-action contact between the lender and the borrower in an effort to seek agreement between the parties, and where this cannot be reached, to enable efficient use of the court's time and resources.

- 2.2 Where either party is required to communicate and provide information to the other, reasonable steps should be taken to do so in a way that is clear, fair and not misleading. If the lender is aware that the borrower may have difficulties in reading or understanding the information provided, the lender should take reasonable steps to ensure that information is communicated in a way that the borrower can understand.

### **3. SCOPE**

- 3.1 This protocol applies to proceedings brought under the Rules of the Supreme Court Order 88 or the County Court Rules (NI) 1981 in relation to arrears on all residential mortgages including both those regulated by the Financial Services Authority under the Financial Services and Markets Act 2000 and those which are unregulated and agreements under the Consumer Credit Act 1974 secured by mortgage. It does not apply to proceedings brought in relation to what are commonly known as "buy to let" mortgages.
- 3.2 Where a potential claim includes a money claim for possession this protocol applies to both.

### **4. DEFINITIONS**

- 4.1 In this Protocol-
- (1) 'possession proceedings' means a mortgage action for possession as defined by Order 88, rule 1 of the Rules of the Supreme Court and mortgage should be read accordingly;
  - (2) 'home purchase plan' means a method of purchasing a property by way of sale and lease arrangement that does not require the payment of interest;
  - (3) 'bank holiday' means a bank holiday under the Banking and Dealings Act 1971;
  - (4) 'public holiday' has the meaning assigned to it by section 39(8) of the Interpretation Act (Northern Ireland) 1954;
  - (5) 'business day' means any day except Saturday, Sunday, a bank holiday or a public holiday.

## **SECTION II- ACTIONS PRIOR TO THE START OF POSSESSION PROCEEDINGS**

### **5. INITIAL CONTACT AND PROVISION OF INFORMATION**

- 5.1 Where the borrower falls into arrears the lender should provide the borrower with-
- (1) where appropriate, the required regulatory information sheet; and
  - (2) information, in plain English, concerning the amount of arrears which should include-
    - (a) the total amount of the arrears;
    - (b) the total outstanding of the mortgage or the home purchase plan; and
    - (c) whether interest or charges will be added, and if so and where appropriate, details or an estimate of the interest or charges that may be payable.
- 5.2 The parties should take all reasonable steps to discuss with each other, or their representatives, the cause of the arrears, the borrower's financial circumstances and proposals for repayment of the arrears (see 7.1). For example, parties should consider whether the causes of the arrears are temporary or long term and whether the borrower may be able to pay the arrears in a reasonable time. Where the property is subject to an equity sharing lease (commonly called a co-ownership), these discussions should also involve the Northern Ireland Co-Ownership Housing Association.
- 5.3 The lender should where appropriate advise the borrower to make early contact with the Northern Ireland Housing Executive and, should, refer the borrower to appropriate sources of free independent debt advice (provided by an organisation licensed to provide such advice by the Office of Fair Trading).
- 5.4 The lender should consider a reasonable request from the borrower to change the date of regular payment (within the same payment period) or the method by which payment is made. The lender should either agree to such a request or, where it refuses such a request, it should, within a reasonable period of time, give the borrower written explanation of its reasons for the refusal.
- 5.5 The lender should respond promptly to any proposal for payment made by the borrower. If the lender does not agree to such a proposal it should give reasons in writing to the borrower within 10 business days of the proposal.
- 5.6 If the lender submits a proposal for payment, the borrower should be given a reasonable period of time in which to consider such proposals. The

lender should set out the proposal in sufficient detail to enable the borrower to understand the implications of the proposal.

- 5.7 If the borrower fails to comply with an agreement, the lender should warn the borrower, by giving the borrower 15 business days notice in writing, of its intention to start a possession claim unless the borrower remedies the breach in the agreement.

## **6. POSTPONING THE START OF POSSESSION PROCEEDINGS**

- 6.1 A lender should consider not starting possession proceedings for mortgage arrears where the borrower can demonstrate to the lender that the borrower has-
- (1) submitted a claim to –
    - (a) the Social Security Agency for support with mortgage interest or
    - (b) an insurer under a mortgage payment protection policy
- and has provided all the evidence required to process such a claim;
- (2) a reasonable expectation of eligibility for payment from the insurer; and
  - (3) an ability to pay a mortgage instalment not covered by such a claim to the Social Security Agency or the insurer in relation to a claim under paragraph 6.1(1)(a) or (b).
- 6.2 If a borrower can demonstrate that reasonable steps have been or will be taken to market the property at an appropriate price in accordance with reasonable professional advice, the lender should consider postponing starting possession proceedings. The borrower must continue to take all reasonable steps actively to market the property where the lender has agreed to postpone starting a possession claim.
- 6.3 Where the lender has agreed to postpone starting possession proceedings the borrower should provide the lender with a copy of the particulars of sale and (where relevant) details of purchase offers received within a reasonable period of time specified by the lender. The borrower should give the lender details of the estate agent and the conveyancer instructed to deal with the sale. The borrower should also authorise the estate agent and the conveyancer to communicate with the lender about the progress of the sale and the borrower's conduct during the process.
- 6.4 Where the lender decides not to postpone the start of the possession proceedings it should inform the borrower of the reasons for this decision at least 5 business days before starting proceedings.

## **7. ALTERNATIVE DISPUTE RESOLUTION**

- 7.1 The court takes the view that starting possession proceedings is usually a last resort and that such proceedings should not normally be started when a settlement is still actively being explored. Discussion between the parties may include options such as the following:
- (1) extending the term of the mortgage;
  - (2) changing the type of a mortgage;
  - (3) deferring payment of interest due under the mortgage;
  - (4) capitalising the arrears;
  - (5) payment holiday;
  - (6) reducing the interest rate and
  - (7) alternative affordable mortgage products.
- 7.2 The lender should accept a reasonable request from the borrower to consider any of the above options.

## **8. COMPLAINTS TO THE FINANCIAL OMBUDSMAN SERVICE**

- 8.1 The lender should consider whether to postpone the start of possession proceedings where the borrower has made a genuine complaint to the Financial Ombudsman Service (FOS) about the potential possession claim.
- 8.2 Where a lender does not intend to await the decision of the FOS it should give notice to the borrower with reasons that it intends to start possession proceedings at least 5 business days before doing so.

## **9. COMPLIANCE**

- 9.1 Parties should be able, if requested by the court, to explain the actions that they have taken to comply with this protocol.
- 9.2 If a party unreasonably fails to comply with the terms of this protocol, the court may take this into account in arriving at its decision either on costs or generally.